77-1865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

BENJAMIN WARD, Commissioner, New York State Department of Correctional Services, and ROBERT E. MCCLAY, Superintendent, Arthur Kill Correctional Facility,

Petitioners,

against

WILLIAM BULGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, the custodians of the respondent, respectfully pray that a writ of certiorari issues to review the order of the Court of Appeals for the Second Circuit entered herein on May 4, 1978.

Opinions Below

The decision of the Court of Appeals has yet not been reported. A copy of that Court's order is appended hereto at page 1a.* The opinion of the Court of Appeals is appended at page 3a.

* Numbers followed by "a" refer to pages of the appendix hereto.

The opinions of the District Court (E.D.N.Y., WEINSTEIN, D.J.) are not reported. The opinion granting the writ was delivered from the bench, November 30, 1977, and a transcript is appended hereto at page 12a. The opinion denying reconsideration dated December 19, 1977 is appended at page 23a.

Jurisdiction

The order of the Court of Appeals was rendered on May 4, 1978. The jurisdiction of this Court to review that order rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Was the state court hearing adequate so that the federal courts should be bound by the determination by the state courts?

2. Did the federal court properly grant habeas corpus setting aside a state court conviction on the basis of allegedly "crucial" evidence getting to the jury in an extrajudicial manner in conflict with *Wainwright* v. *Sykes*? And contrary to its own decision on criminal trials in the district court?

Statement of the Case

Petitioners seek review of an order of the Court of Appeals for the Second Circuit (1a) which affirmed an order of the District Court for the Eastern District of New York granting a writ of habeas corpus. The Court of Appeals stayed its mandate on condition of early filing of this petition but at the same time granted a cross-motion for bail or release of the convicted state defendant which obviously was contradictory and in effect negated the purpose of the stay—*i.e.*, maintain the *status quo*.

The underlying facts are as follows: The respondent was arrested in the early-morning hours (4-5 a.m.) of September 24, 1974 for the burglary of a store in Staten Island, N.Y. This occurred after a phone-call to the police from an eye-witness, who lived across the street and saw the events. This resulted in the police arriving quickly at the scene and finding petitioner with a companion* at a near-by bus stop, indeed one was adjacent to the store.

At the trial, besides the testimony of the eye-witness, which was itself adequate, the arresting officer testified to the arrest and in addition stated that at the arrest by the bus stop petitioner had said he was at that place because he was on his way to work. Petitioner did not testify at the trial, so the testimony as to his statement is uncontradicted.

The jury deliberated and returned a verdict of guilty of burglary in the third degree. As the jury was coming out, the defense counsel, Mr. Light, questioned some jurors in the presence of the Assistant District Attorney. On that basis defense counsel moved for a new trial claiming that the jury had become aware of defendant's home address through an article in a local newspaper. The address, it was argued, was significant because, if the jury in its deliberations became aware that the defendant did not reside in the area, the defendant could not be at the bus stop on his way to work. But there had been no testimony introduced by defendant that he and his companion resided at any particular residence in the area and the argument was of doubtful validity especially in view of the eye-witness testimony which was not rebutted.

The state trial court (Justice Barlow) held an examination in open court of the juror alleged to have had the conversation with defense counsel. After questioning, the court denied the motion for a new trial.

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* This person was not tried due to being a fugitive from justice.

This was affirmed by the Appellate Division, 53 App. Div. 2d 808, 810, 384 N.Y.S. 2d 712 (2nd Dept. 1976) and leave to appeal was denied by the State Court of Appeals on June 28, 1976 by Breitel, C.J. Bulger then brought an application for habeas corpus in the district court. Judge Weinstein of the Eastern District granted the writ on the basis that the state court (Barlow, J.) had deprived the petitioner of the benefit of the New York procedure on impeaching a jury verdict. The State appealed and a panel of the Court of Appeals affirmed but on totally different grounds.* The Court apparently found the facts herein analogous to *U.S. ex rel. Owens* v. *McMann,* 435 F. 2d 813 (2d Cir., 1970), *cert. denied* 402 U.S. 906 and that *Owens* controlled. Preliminarily, it ruled that the state court hearing had not been full and fair on the "constitutional" claim.

The district court stayed its order pending appeal and the Court of Appeals in turn stayed its mandate pending this petition for certiorari. Yet it granted a cross-motion for release on bail, *supra* and at the present time petitioner is not in state custody although bail has been posted.

Reasons for Granting the Writ

Adequacy of the State Court Hearing

The Court of Appeals for the Second Circuit's decision, in affirming the district court and holding the state court hearing inadequate under *Townsend* v. *Sain,* 372 U.S. 293 (1963), was totally conclusory. That Court's criticism of Justice Barlow is clearly unfounded as he was not required to hold a hearing to consider the question of extra-testimonial evidence reaching the jury on the basis simply and

* The Court engaged in a peculiar exercise here. It rejected Judge Weinstein's legal reasoning but accepted his so-called factual findings. In effect we have never had review of the granting of the writ in light of the panel of the Circuit Court's departure from the district court basis, except as to the granting of the writ.

solely of defense counsel's affidavit. A juror's affidavit is required, at the least under New York settled law. *People* v. *DeLucia,* 20 N Y 2d 275, 229 N.E. 2d 211 (1967). Further the defense counsel's proposed cross-examination was properly excluded as irrelevant.*

Contrary to the view of the Circuit Court's disposition here, the opinion in *Stone* v. *Powell,* 428 U.S. 465 (1976), is relevant here as to the scope of federal habeas corpus. Bulger admittedly raised the adequacy of the state hearing by Justice Barlow on appeal and in consequence the state appellate courts reviewed the matter. The lack of a written opinion is not relevant. It is strange that the panel of the Circuit Court criticizes the Appellate Division in the light of the fact that the Court had previously stated in *Lecci* v. *Cahn,* 493 F. 2d 826, 830 (2d Cir. 1974), that criticisms of state affirmances rendered without opinion and without specific reference to the constitutional question are "of course immaterial."

Contrary to the district court, the state court disposition thus was more than adequate as it was unnecessary in the circumstances and complete. Controlling on the Circuit's erroneous holding of inadequacy here and warranting summary reversal and dismissal of the writ is *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973), where this Court held that the finding of inadequacy must be based on the totality of the circumstances in the state court—*LaVallee* was a reversal of the Second Circuit based on the record. This is relevant to the claim presented by petitioners below that the fact of Bulger's residence, even if known to the jury, was at most harmless error. *Chapman* v. *California,* 386 U.S. 18 (1967); *Harrington* v. *California,* 395 U.S. 250 (1969). It was never disputed and is admitted that the address, 26 Avon Place, Staten Island, N.Y. was and is Bulger's residence. A new

* Judge Barlow had already, in effect, asked the question and it would not have provided relevant testimony. The Court's criticism violates comity as it reviews state court rulings on the competence of counsel's questions.

trial would change nothing. The decision here only adds to the fragile state of criminal convictions.

Also relevant to the lack of merit to the panel's criticism of the state hearing is the Circuit Court's own decision in *United States* v. *Hockridge,* —— F. 2d —— (March 27, 1978), Slip Opin., pp. 2133, 2138-39 where a different panel approved, on a federal criminal conviction where the scope of review available to that court is greater, a less thorough procedure of review of jury conduct (in *camera* questioning by trial judge; obviously without cross-examination). Yet it held as unconstitutional the state court procedure here.

No trial judge, state or federal, is under any obligation to investigate the mental processes of a jury or of any single juror, which has occurred here. *United States* v. *Green,* 523 F. 2d 229 (2d Cir. 1975), *cert. denied* 423 U.S. 1047. How one piece of information, a home address of defendant, could be prejudicial and warrant a grant of habeas corpus is beyond comprehension. It clearly requires going into jurors' mental processes which the District and Circuit did. It should legally and constitutionally be unavailable to raise a possible trial indiscretion, if it be that, to the height here is clearly unwarranted. As in *United States* v. *Solomon,* 422 F. 2d 1110 (7th Cir. 1970), *cert. denied* 399 U.S. 911, the Circuit should have found, as did the state courts, that the address information contained no significance of such a grave and inherently prejudicial nature as to dictate a new trial.

There is little doubt that the panel of the court erred in finding the state court hearing "inadequate".

There was no Constitutional Error.

Totally rejecting the district court's reason for granting the writ* but still affirming the district court the panel relied on its own case, *U.S. ex rel. Owens* v. *McMann,* 435

* Ftn. 2, p. 2921 (11a).

F. 2d 813 (2d Cir. 1970), *cert. denied* 402 U.S. 906, which was an affirmance of habeas corpus based on extrajudicial prejudicial evidence getting to the jury. But in *Owens* this information was to the effect of defendant's being in trouble all of his life, being suspended from the police force and other matter indicating his background and character was bad. It also said the conclusion that the prejudice in *Owens* was of constitutional dimensions was "by no means bright line . . .", 435 F. 2d at 818.

The decision below expanding its own decision in *Owens* is contrary to *United States* v. *Love,* 535 F. 2d 1152 (9th Cir. 1976), *cert. denied,* 429 U.S. 847. A fair reading of opinions here demonstrates this. *Owens* itself is questionable but at least must be limited to its special facts. Reliance on it and totally ignoring *Love* resulted in the Second Circuit panel impermissibly expanding the scope of federal habeas corpus. In the state court, the police officer had testified, without objection, to Bulger's statement about being at the bus stop, going to work* and Bulger did not testify at all. In this situation habeas corpus simply could not be successfully available. *Wainwright* v. *Sykes,* —— U.S. ——, 53 L.Ed. 2d 594 (1977). The panel of the Circuit Court was going into the jury's mental processes in ascribing prejudicial effect to any knowledge that Bulger's residence was not in the area and thereby overruling the state courts who had passed on the same question and had determined otherwise.**

* This was astounding as at 4-5 a.m. in the morning the bus ran once an hour and someone does not stand at a bus stop in Staten Island without fuller knowledge. The Circuit was aware of this but ignored it.

** The instant decision thus goes against a strong public policy of courts not going into the deliberative processes of jurors in jury rooms. *U.S.* v. *Dioguardi,* 492 F. 2d 70 (2d Cir. 1974), *cert. denied* 419 U.S. 829; *Govt. of Virgin Islands* v. *Gereau,* 523 F. 2d 140, 148 (2d Cir. 1974) *cert. denied* 96 S.Ct. 1119.

CONCLUSION

Certiorari should be granted and the order of the Court of Appeals summarily reversed or plenary argument directed.

Dated: New York, New York
June 23, 1978

Respectfully submitted,

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APPENDIX A

Order of the Court of Appeals filed April 4, 1978

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of May one thousand nine hundred and seventy-eight.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. J. EDWARD LUMBARD
HON. J. JOSEPH SMITH
Circuit Judges,

78-2009

WILLIAM BULGER,
Petitioner-Appellee,

v.

ROBERT E. MCCLAY, Superintendent, Arthur Kill Correctional Facility, and BENJAMIN WARD, Commissioner, New York State Department of Correctional Services,
Respondents-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix A

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

By ARTHUR HELLER,
Deputy Clerk

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 833—September Term, 1977.

(Argued April 21, 1978 Decided May 4, 1978.)

Docket No. 78-2009

WILLIAM BULGER,
Petitioner-Appellee,

—against—

ROBERT E. MCCLAY, Superintendent, Arthur Kill Correctional Facility, and BENJAMIN WARD, Commissioner, New York State Department of Correctional Services,
Respondents-Appellants.

Before:

KAUFMAN, *Chief Judge,*
LUMBARD and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, *J.*, granting Bulger's petition for a writ of habeas corpus on the ground that information outside of the record had come to the jury's attention.

Affirmed.

JONATHAN J. SILBERMANN, New York, New York (Martin Erdmann, The Legal Aid Society, of counsel), *for Petitioner-Appellee.*

Appendix B

A. Seth Greenwald, Assistant Attorney General, New York, New York (Samuel Hirshowitz, Assistant Attorney General, of counsel), *for Respondents-Appellants.*

Kaufman, *Chief Judge:*

The remarkable institution known as the Anglo-American jury is such a commonplace of our judicial structure that we have perhaps become dulled to its primary characteristics. But, as Justice Holmes observed over half a century ago in *Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907), one of the precepts of our system is that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." The issue presented by this case is whether, in derogation of this basic tenet, the jurors at appellee's state court trial improperly considered evidence *dehors* the record.

I.

In October of 1975, William Bulger was brought to trial in the Supreme Court of Richmond County on charges of petit larceny and burglary in the third degree. The state, primarily through the testimony of Carol Perine, an eyewitness, sought to prove that Bulger was involved in the September 24, 1974 theft of ten cartons of cigarettes and a quantity of change from a grocery store located on the corner of Heberton and Post Avenues, Port Richmond, Staten Island. Perine, who lived across from the store, testified that she was awakened by a loud noise during the night of September 24. Looking out of her window, she saw a dark-haired fellow, subsequently identified as Thomas

Appendix B

Sigman, crawl through a hole in the glass door of the store and hand a brown paper bag to Bulger. Sigman then left the store, taking the bag from Bulger and secreting it under a car. As she was observing the pair, Perine called the police. In fact, two police officers arrived on the scene shortly after Bulger and his companion had walked to a bus stop on the corner and were waiting there. Perine testified, and her testimony in this regard was corroborated by Officers Robert Prather and Allen Simon, that one of the two men told the police that he was just waiting for the bus.

On cross-examination, Perine was confronted with her prior statements elicited at a preliminary hearing and before the grand jury, when she stated that Bulger had been standing near a street light, and had never left the light pole. She then admitted, "This is like a year ago, now. I, you know, each time I've been very nervous and I—I don't remember really." Bulger did not testify and his home address was never a part of the trial record.

By the conclusion of the trial, it was apparent that Bulger's justification for being in the area was an issue of some significance, and the District Attorney, in summation, stressed the meritlessness of Bulger's excuse:

> So what's the reason for him standing on the bus corner? He said I am going to work; that's his story, believe it or not, it's up to you, you got to believe that at four in the morning he's standing with a dark-haired fellow and they are going to work.

Following the closing, which preceded a weekend recess, Justice Barlow cautioned the jurors not to read any newspaper accounts of the case.

On Monday, October 27, the jury deliberated for five hours, and indicated they were unable to reach a verdict. A modified *Allen* charge was then given, and one and a half hours later, the jurors found Bulger guilty of burglary in

the third degree. Apparently spurred by the jurors' evident difficulty in arriving at a verdict, Bulger's counsel questioned individual jurors as they left the courtroom. In a post-trial affidavit, the attorney stated that in one such conversation with Juror #4, a Mr. Moran, he admitted to counsel that he had changed his vote after one of the other jurors mentioned the contents of a newspaper article published over the weekend. That story contained Bulger's address, which it set forth as quite distant from the scene of the crime, and, accordingly, rendered Bulger's excuse for being in the area highly improbable. Based on this disclosure, Bulger's counsel moved for a hearing and a new trial on the ground that prejudicial, extra-record information had tainted the jury's deliberations.

In response to the motion, the trial judge, Justice Barlow, called Moran and questioned him under oath. The juror then indicated that Bulger's home address was not mentioned during deliberation. After Justice Barlow had established this fact to his own satisfaction, he did not allow defense counsel to cross-examine Moran although such a request had been made. Justice Barlow then denied the motion for a new trial. Bulger promptly appealed, arguing that the failure to hold an adequate hearing violated his constitutional rights to due process and confrontation. The judgment of conviction was affirmed by the Appellate Division without opinion and, on June 28, 1976, leave to appeal to the Court of Appeals was denied.

On May 31, 1977, Bulger filed a petition for a writ of habeas corpus in the federal court, claiming that the introduction of extra-record information violated his Sixth Amendment and due process rights. A hearing on the question was held on September 16, 1977 before Judge Weinstein. At the hearing, juror Francis Johnston testified that, during deliberations, one of the jurors mentioned Bulger's home address and that "it became a subject of

heated discussion." Johnston could not recall, however, whether the information came from a newspaper article or some other source. Juror Moran, although subpoenaed to appear, failed to do so. In addition to Johnston's testimony, the parties stipulated that Bulger's address was not introduced at trial and that a newspaper article, appearing on the Saturday preceding the jury's deliberations, revealed Bulger's place of residence.

On the facts before him, Judge Weinstein found that the state court had failed to give Bulger an adequate hearing. Rather than decide the constitutional issue of jury prejudice on the merits, Judge Weinstein chose to afford the state judge an opportunity to correct his error. Accordingly, Judge Weinstein directed that a writ of habeas corpus would be granted if the state court did not hold a post-verdict hearing on the motion to set aside the verdict in 60 days. When the state court failed to afford this hearing within the requisite period, Judge Weinstein granted the writ on November 30, 1977, conditioned, of course, on the state court's failure to retry Bulger within 60 days.

In elaborating his reasons for granting the writ, the district judge found that the state court hearing was inadequate; that the jurors learned of Bulger's address during deliberations; and that this information was no doubt critical to the determination of guilt. Rather than premise the constitutional violation on the due process clause, Judge Weinstein based his holding on an equal protection rationale. He reasoned that Bulger had been deprived of New York State's strict rule interdicting the admission of information *dehors* the record and, consequently, the state procedures utilized violated the Equal Protection clause of the Constitution.

Subsequent to Judge Weinstein's decision, the state trial judge filed a written memorandum, reaffirming the denial of any hearing more extensive than the one originally granted. Justice Barlow, based only on the transcript in

the federal court proceedings, found Johnston's testimony incredible, and reasserted his belief in Moran's views. The State then moved for reconsideration of the district court's opinion, and its motion was denied in a memorandum and order dated December 19, 1977.

II.

Before proceeding to the substantive constitutional issue, we must, in the interests of comity, consider whether Bulger was afforded a full and fair opportunity to litigate his constitutional claim in state court, and thereby is precluded from seeking federal relief. *Stone* v. *Powell,* 428 U.S. 465 (1976).[1] Certainly, there is little doubt that the hearing conducted by Justice Barlow was neither full nor fair. *See Townsend* v. *Sain,* 372 U.S. 293 (1963); *Suggs* v. *LaVallee,* Slip Op. at 1361 (2d Cir., Jan. 27, 1978). Justice Barlow's examination of juror Moran was, at best, cursory, particularly in light of the serious questions raised by the affidavit of Bulger's defense counsel. And the refusal of Justice Barlow to allow any cross-examination only exacerbated the inadequacy of his own examination. Moreover, Justice Barlow did not make any effort whatsoever to determine which of Moran's representations were credible by questioning other jurors.

Nor does the fact that Bulger raised the issue of the inadequacy of the state hearing on appeal in the state courts preclude federal relief. The appellate proceedings, standing by themselves, fell far short of the full and fair

[1] The extent to which *Stone* v. *Powell,* 428 U.S. 465 (1976) reaches beyond the context of the Fourth Amendment is by no means clear. *See The Supreme Court, 1975 Term,* 90 Harv. L. Rev. at 217 (1976). We merely point out that, when measured by the standard of *Stone,* Judge Weinstein demonstrated an appropriate sensitivity to the interests of comity.

opportunity to litigate contemplated by *Stone.* There is not the slightest indication that the state courts gave any scrutiny to the claim. The Appellate Division affirmed without opinion, and the Court of Appeals did not grant leave to appeal. This silence in the face of a substantial constitutional question suggests a serious void in the appellate process. *See Gates* v. *Henderson,* 568 F.2d 830, 837 (2d Cir. 1977); *Frank* v. *Mangum,* 237 U.S. 309 (1915).

Finally, Judge Weinstein gave the state a second opportunity to hold an adequate hearing, but Justice Barlow remained adamant in his refusal to do so. Instead, he merely reiterated his earlier findings, going so far as to pass upon the credibility of a witness who had never appeared before him. Under these circumstances, the state procedures were so defective as to warrant federal intervention.

III.

Having found that Judge Weinstein properly exercised jurisdiction, we do not have any difficulty with his determination that the jurors' consideration of extrinsic information violated the Constitution. While the thirteenth century jury may well have been selected for its familiarity with the facts in a particular case, the modern jury is instructed to reach its verdict solely on the basis of the evidence before it. *See Irwin* v. *Down,* 366 U.S. 717 (1961). This sensitivity to the source of information brought into the jury room in grounded in the unremarkable perception that all evidence developed against an accused must "come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner* v. *Louisiana,* 379 U.S. 466, 472-73 (1965). It does not matter whether the "taint" of outside influence derives from pervasive adverse prejudicial publicity which cannot be ob-

literated from the jurors' minds, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966) or the ill-chosen remarks of a bailiff, *Parker* v. *Gladden,* 385 U.S. 363 (1966).

In determining specifically whether the introduction of extrinsic evidence warrants habeas corpus relief, the starting point must be the opinion of Judge Friendly in *United States ex rel. Owen* v. *McMann,* 436 F.2d 813 (2d Cir. 1970), *cert. denied,* 402 U.S. 906 (1972). In *Owen,* several of the jurors mentioned that they knew "all about Owen," and introduced in their deliberations the facts that Owen's father was constantly getting him "out of trouble"; that Owen had been suspended from the police force in connection with the unauthorized use of a prowl car; and that he had been involved in a tavern fight. Finding that specific extra-record facts had been discussed and that there was a significant possibility of prejudice, we held that Owen's due process rights had ben violated. *Id.* at 818.

There is certainly an adequate basis for Judge Weinstein's finding in this case that crucial information not in the trial record was discussed by the jurors in their deliberations. Juror Johnston testified before Judge Weinstein that Bulger's residence had been an important subject of discussion during jury deliberations; the district court also had before it Bulger's attorney's affidavit attesting to juror Moran's statement to a similar effect. Their statements, coupled with the intervening newspaper article reporting the address, were sufficient to establish that the information was impermissibly imparted to the jury and discussed by its members, although it had been absent from the trial record.

Nor is there any real question that Bulger was prejudiced by the jury's discussions of this extraneous evidence. The discovery by the jurors that Bulger lived a good many miles from the scene of the burglary certainly tended to discredit his excuse for being at the bus stop. Moreover, the jurors were obviously troubled by the case and by the

inconsistencies and uncertainties in Ms. Perine's testimony, as was indicated by their difficulty in reaching a verdict. We have little doubt that the knowledge of Bulger's address may well have been determinative.[2]

IV.

The jury, of course, is not a sterile institution in our judicial structure. It would be naive to suggest that individual jurors leave all their preconceptions, values and insights on the doorstep when they enter the jury room. Indeed, we encourage jurors to bring their experiences to bear during deliberation. The line between this permissible activity and the consideration of improper evidence is seldom clear. Yet, where specific facts enter the crucible of decision without appropriate safeguards, the constitutional role of the jury is undermined, and the defendant is denied the fair trial which is his constitutional due.

Affirmed.

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[2] We do not agree with Judge Weinstein's rationale concerning the denial of Bulgar's equal protection under the laws; such an approach would suggest that every deviation from state law and procedure might be claimed to be a constitutional violation warranting habeas corpus relief.

APPENDIX C

Transcript of Decision and Order, Weinstein, D.J. (Eastern District of New York) November 30, 1977.

The Court: Well, maybe I better read my decision and you can have it.

"This will supplement my oral opinion at pp. 18-20, 27-29, 31-37, 41-44 of the transcript of the hearing held in this Court on September 16, 1977.

"I. *Facts.*

"Petitioner was convicted after trial of the crime of Burglary, Third Degree. The Supreme Court Richmond County entered judgment on December 12, 1975. Petitioner was sentenced to a prison term of no less than three nor more than six years. Petitioner's writ of habeas corpus is brought on the ground of a tainted jury verdict. It is alleged that the jury received prejudicial information about petitioner's address from extra-judicial sources.

"On December 5, 1975, after a short hearing, the State trial court denied a motion for a new trial. The Appellate Division, without opinion, affirmed the conviction on June 14, 1976. Leave to appeal to the Court of Appeals was denied on June 28, 1976.

"The burglary took place in the early morning hours of September 24, 1974. Petitioner told the police officer who arrested him that he was on his way to work. Petitioner's guilt turned on the question of whether he was aiding and abetting the man who entered the store or only waiting for a bus at the corner. If the petitioner did not live in the area the jury would be less likely to believe his defense that he was waiting for a bus on his way to work.

"At trial, the petitioner did not take the stand. Nor did the prosecution introduce any evidence about his address.

"On his motion to set aside the verdict at the end of the case, petitioner's trial attorney, Mr. Light, affirmed that immediately after trial he talked to juror Number 4, a Mr.

Moran, in the presence of Assistant District Attorney Nirenberg, who had tried the case. Juror Number 4 was alleged to have stated that he had been one of the jurors who had voted for acquittal up to the time the judge sent the jury back for more deliberation. The same juror was also alleged to have told Mr. Light that he changed his vote after one of the other jurors stated that he read in the newspaper over the weekend that the petitioner Bulger did not live in Port Richmond, Staten Island and that since he was not from the neighborhood he may have been at the scene participating in the crime. There was a newspaper article giving this information while the case was being tried, but the transcript of the state proceedings does not indicate that the article was placed in the record.

"Assistant District Attorney Nirenberg acknowledged he was present during a conversation between Mr. Light and juror Number 4. He asserted that he did not hear Mr. Moran 'make the statement attributed to him by Mr. Light' (Exhibit '3'). In a November 5, 1977 affidavit, the Assistant District Attorney affirmed the same matter and noted that he 'did not hear Mr. Moran state that he had read a newspaper article pertaining to the (then) defendant's (Exhibit "2")."

"Pursuant to petitioner's trial counsel's motion, a hearing was held on December 5, 1975 at which Juror Number 4 testified under oath as follows:

"Examination by the Court:

"Question: Mr. Moran, werge you a juror on the case of People versus William P. Buler, a burglary case that was tried in this county, in this courthouse—but not in this room; it was tried in the small courtroom a few weeks back?

"Answer: Yes, sir.

"Question: Do you recall what your seat number was? Was it number 4?

"Answer: Yes, 4.

"Question: Mr. Moran, listen carefully to the questions that I put to you and answer them as precisely as you can.

"While the jury was deliberating on its verdict, do you remember whether or not you or any other juror mentioned the home address or the home town of the defendant?

"Answer: No, sir.

"Question: You do not remember?

"Answer: I know there was no—

"Question: It was not mentioned?

"Answer: It was not mentioned

"Thereafter, Mr. Light sought to cross-examine Mr. Moran, but the Court prevented him from doing so. Mr. Light was permitted to put on the record questions concerning areas of inquiry he would have liked to pursue. Those questions involved (1) the witness' recollection, if any, of the purported statement to Mr. Light in the presence of the Assistant District Attorney and (2) whether Mr. Moran changed his vote because of anything said in the jury room. The transcript reads as follows:

"The Court: Thank you very much, Mr. Moran. Thank you for coming in. I am sorry we had to take you away from your business.

"Mr. Light: May I inquire?

"The Court: Just a moment, Mr. Moran.

"Tell me what your question is going to ask.

"Mr. Light: Can I ask it?

"The Court: Ask it to me, right on the record.

"Mr. Light: Can I ask it, and then you rule on it before the witness—

"The Court: Say it out loud on the record, the question you want to put to this witness.

"Mr. Light: I was going to ask Mr. Moran if he was the gentleman that spoke to Mr. Nirenberg and myself downstairs after the jury—

"The Court: I will not allow that question.

"Mr. Light: I was also going to ask Mr. Moran if he told us that another member of the jury panel read in the newspaper that defendant did not live in Port Richmond and then Mr. Moran got into conversation about having sons and that they hang out on the street corner. There is nothing wrong with hanging out on a street corner, per se.

"The Court: I won't admit that question.

"Mr. Light: I was going to ask Mr. Moran if he was one of the jurors that told us that he was one of four jurors who was going to vote not guilty and that they came back to the courtroom and said they were deadlocked, and upon your Honor's instruction to try again Mr. Moran stated that the reason that he changed the vote was because one of the jurors stated in the jury room that the defendant didn't live in Port Richmond, that he came from Rosebank or from a different area and that he read in the newspaper, and that's why the four 'not guilty' changed their vote, because he wasn't from the Port Richmond neighborhood.

"The Court: I will not permit that question.

"Anything else?

"You may step down, Mr. Moran."

"Upon the completion of the examination the Court denied petitioner's motion to set aside the verdict and for a new trial ruling, stating:

" 'I find there is no evidence, no credible evidence of any jury misconduct in this case or there is not evidence of the introduction into the deliberation of this jury of facts not in evidence at the trial.'

"II. *Procedure before this Court*

"On September 16, 1977, this Court held a hearing on the petitioner's habeas corpus petition. Neither Mr. Moran, the juror, nor Mr. Light, the original defense counsel, testified. Mr. Moran was subpoenaed but failed to appear and Mr. Light was enagaged in another court.

"The State offered as an exhibit a one-page questionnaire prepared by the State and purportedly signed by Mr. Moran. The statement was taken by a Richmond police officer in August 1977. The answers confirmed the position that Mr. Moran took at the December 5, 1975 State court hearing.

"Although Mr. Moran did not testify, another juror, Mr. Francis Johnston, did. Mr. Johnston, a credible witness, swore that during jury deliberations one of the jurors had mentioned that petitioner lived in an area far from the crime. Mr. Johnston could not remember if the other juror had displayed a newspaper article with this information or had simply related it. Defendant's address became the subject of 'heated discussion,'—Transcript at p. 6—raising the question of why petitioner was in the area when he lived so far away. Mr. Johnston also recalled that following the discharge of the jury, he overheard one of the other jurors mention petitioner's address to defense counsel. Transcript at pp. 5-9.

"The trial Assistant District Attorney Nirenberg also testified. He states that a three-way conversation among him, defense counsel and Moran never took place.

"No one else testified at the hearing. Petitioner's counsel informed the Court that her office contacted each one of the jurors who had sat on the case. She said one juror is in Colorado one juror was in the hospital; and the other jurors all said they did not remember anything, that the case is over, and that they are not interested in reopening it. Transcript at p. 37.

"At the hearing the parties stipulated that the Staten Island Advance of the Saturday immediately before the deliberations (which were on Monday) did contain an article about the trial which mentioned petitioner's address. Transcript at pp. 21-22.

"At the conclusion of the hearing, this Court determined that petitioner had not been afforded the full and fair

hearing required by 28 U.S.C. Section 2254. Section (d) of that statute provides that a determination after a hearing by a State court is presumed correct unless it is established:

". . .

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing:

". . .

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding.

"In consonance with respect for State courts, and in consideration of comity, this court took no action. Instead, it afforded the State trial court an opportunity to hold a proper hearing. Counsel for respondent was requested to bring to the State Court's attention the testimony of juror Johnston, who flatly stated that the information about the petitioner's address came to the attention of, and was considered by, the jury. This Court suggested that, on the basis of the new record, the State Court might be able to reach a decision without holding a further hearing. This Court therefore withheld further action so that the State Court would have 60 days to hold a hearing should it decide one was necessary. Sixty days have now elapsed and the State Court apparently has neither held a hearing nor made any other determination.

"III. *New York Law.*

"Under New York law a juror may, under certain limited circumstances, impeach his own verdict. People v. DeLucia, 20 N.Y. 2d 275, 282 N.Y.S. 2d 526, 229 N.E. 2d 211 (1967); People v. Crimmins, 26 N.Y. 2d 319, 310 N.Y.S. 2d 300 (1970). The New York Court of Appeals reached this conclusion in *DeLucia* where it appeared that several

jurors not only went to the scene, but actually re-enacted the alleged crime; the Court held:

"Our re-evaluation of the common-law rule that jurors may not impeach their own verdicts reveals that in the case of such inherently prejudicial 'outside influences' on a jury as were here present, the violation of the defendants' Sixth Amendment rights outweighs the policy reasons for the rule.'

"*Id* at 279, 282 N.Y.S. 2d at 530. Since the *DeLucia* case was brought before the Court on mere allegations, a hearing was ordered to determine whether the allegations could be substantiated.

"*Crimmins* also involved an unauthorized view. The Court of Appeals restated the *DeLucia* rule and then, because the unauthorized juror visit had been described in testimony in court, ordered a new trial without a remand for a hearing.

"In United States ex rel. Owen v. McMann, 435 F. 2d 813 (2d Cir. 1970), *cert denied,* 402 U.S. 906, 91 S. Ct. 1373 (1971), the Second Circuit, in approving the grant of a writ of habeas corpus to a state prisoner, construed *DeLucia* as follows:

" 'We would read Judge Keating's opinion as in effect adopting for New York the rule of Woodward v. Leavitt, 107 Mass. 453, 466 (1871), approved in Mattox v. United States, *supra*, 146 U.S. at 149, 13 S.Ct. at 53, that "a juryman may testify to any facts bearing upon the question of any extraneous influence, although not as to how far that influence operated upon his mind," with "extraneous" including misconduct by the jurors themselves.'

"*Id.* at 819 (footnote omitted). "Attempting a definition of extraneous influence, the Court noted that "There is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on

the basis of the printed word and that which comes from his brain." '

Id. at 820.

"Faced with the allegations of possible outside influence, lower New York courts have, since *DeLucia,* ordered hearings to determine (1) the nature of the 'infiltrated' material and (2) its prejudicial effect. *See e.g.* People v. Johnson, 79 Misc. 2d 880, 361 N.Y.S. 2d 512, 518 (Dutchess County Court 1974) (hearing on omissions from testimony read to jury); People v. Harris, 386 N.Y.S. 2d 263, 53 A.D. 2d 1007 (App. Div. 4th Dept. 1976) (juror examined at trial outside presence of the jury about recognition of victim of assault); People v. Phillips, 87 Misc. 2d 613, 384 N.Y.S. 2d 906, 918 (S. Ct. Trial Term N.Y. County 1975) (hearing about juror's application for job with prosecutor).

"In *Phillips,* the Court cited United States v. McKinney, 429 F. 2d 1019, 1026 (5th Cir. 1970), *cert denied* 401 U.S. 922, 91 S. Ct. 910 (1971) for the proposition that when jury misconduct is alleged in a defendant's motion for a new trial, the trial judge must: 'conduct a full investigation to ascertain whether the alleged misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for a new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review.' *Id.* at 918.

"The hearing afforded petitioner in the State Court in the instant case was obviously ineffective. Counsel for the defendant was denied the right to ask any questions or present any evidence. There was in effect no hearing at all.

"IV. *Federal Law.*

"The Second Circuit's decision in United States ex rel. Owen v. McMann, 435 F. 2d 812 (2d Cir. 1970), *cert denied*

402 U.S. 906, 91 S.Ct. 1373 (1971), strongly suggests that the petitioner's writ of habeas corpus could be granted on the ground that denial of a new trial under these circumstances is a denial of a federal constitutional right to due process. While the instant case is not decided on this ground, a brief discussion of *McMann* is warranted.

"In *McMann*, the Second Circuit set forth the following standard for determining whether to grant a new trial in a habeas petition challenging a state conviction.

" 'The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecule of extra-record matter, with the supposed consequences that the infiltrator becomes a 'witness' and the confrontation clause automatically applies, but the nature of what has been infiltrated and the probability of prejudice.'

"*Id.* at 818. The Second Circuit approved the Fifth Circuit's United States v. McKinney, 429 F. 2d 1019 (5th Cir. 1970), *cert. denied*, 401 U.S. 922, 91 S. Ct. 910 (1971) standard that critical facts about the particular crime should not be brought to the jury room surreptitiously.

" '(W)hile the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra *facts* into the jury room. In every criminal case we must endeavor to see that jurors do not (consider) in the confines of the jury room . . . specific facts about the specific defendant on trial. . . . *Id.* (emphasis in original).

"The issue here might be different if this were general information available to jurors *before* trial so that the matter could be handled on the voir dire. *Cf. e.g.* Broeder, "The Import of the Vicinage Requirement: An Empirical Look," 46 Neb. L. Rev. 99 (1966). Here the information was published after the case commenced and was highly relevant.

"In a critical footnote, the Second Circuit noted that it slightly modified the excerpt from *McKinney* "so as to

eliminate any suggestion that jurors become 'witnesses,' with consequent automatic entailment of the confrontation clause whenever a juror voices any extra-record facts." *McMann supra* at n. 5. According to the Court of Appeals, the trial judge must make two determinations. First, he must inquire of the jurors whether a discussion of adjudicative facts outside the record did take place. This is a factual issue. Second, the judge must decide the question of prejudice on the basis of an independent evaluation of all the circumstances of the case. *Id.* at n. 5. In deciding whether there was a 'significant possibility' (*Id*) that the defendant was prejudiced, the Court must consider the 'nature of the matter and its probable effect on a hypothetical average jury.' *Id.* at 820. It is 'not the source of the information of the locus of its communication which determines whether the defendant has been prejudiced.' *Id.*

"The Fourth Circuit has also adopted this position. In *Downey* v. *Peyton*, 451 F. 2d 236 (4th Cir. 1971), a habeas corpus proceeding brought by a state prisoner, the Court expressly rejected the respondent's argument that '*McKinney* permits scrutiny solely of Federal court trials, and does not empower a Federal court by habeas corpus to examine State court jury-room occurrences.' *Id.* at 239. The Court of Appeals noted:

"(W)e find clear authority in United States ex rel Owen v. McMann, 435 F. 2d 813 (2d Cir. 1970), for United States court review of State trials, on habeas corpus, where there is such a probability that prejudice will result that it (the verdict) is deemed inherently lacking in due process,' id. at 818 (citing Estes v. Texas, 381 U.S. 532, 542-43, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965).

"Id at 239-40.

"The testimony of juror Johnston at the September 16, 1977 hearing before this Court makes it clear that a discussion of the defendant's address not only took place, but was probably critical to the jury's ultimate finding of guilt.

Appendix C

"Whether New York's high standard with respect to extrajudicial information coming to the attention of the jury is required by the Constitution need not now be decided. For the Equal Protection Clause would require all New York defendants to be afforded the protection of New York's practice. This defendant was denied the procedural protection available to other New York defendants. Thus a new trial is required.

"V. Conclusion.

"The petitioner shall be released unless within 60 days a retrial by the State is commenced. This period will be extended by the time expended in prosecuting appeals from this order.

"So ordered."

APPENDIX D

Memorandum and Order of District Court, December 19, 1977.

E. D. N. Y.

77-C-1019

WILLIAM BULGER,

Plaintiff,

—against—

ROBERT E. MC CLAY, Superintendent of Arthur Kill Correctional Facility and BENJAMIN WARD, Commissioner, New York State Department of Correctional Services,

Defendants.

The State has made a motion to reconsider on the basis of the State court decision dated December 1, 1977. *The People of the State of New York* v. *William P. Bulger,* Ind. No. 379/74 (S.Ct. Richmond County 1977). Citing *People* v. *Lynch,* 23 N.Y.2d 262, 296 N.Y.S.2d 327 (Ct. of Appeals 1968), the State court determined that "[t]he mere possibility of impropriety does not require or even justify a post-verdict hearing." *Bulger supra* at 3. That case is inapposite. Unlike the present case, the defendant did not contend that the jurors had read the newspaper article or had formed an opinion as a result of reading it. The Court held:

> Merely the single publication of the article in the *Herald-Tribune* hardly established the likelihood that it was read by any of the jury or that any were unduly influenced by it.

Lynch supra at 271, 296 N.Y.S.2d at 334.

Appendix D

The State court also discounted juror Johnston's testimony.

> Mr. Johnston's testimony is too uncertain and comes too late to be reliable, balanced as it is by the contrary testimony of Mr. Moran and the silence of the other jurors.

Bulger supra at 3. At the September 16, 1977 hearing held by this court, Mr. Johnston testified, and was cross-examined, at considerable length. The Court found him to be a credible witnes. *Bulger* v. *McClay*, 77-C-1119 at 10 (E.D.N.Y. Nov. 30, 1977). Mr. Johnston's testimony was also corroborated by the affirmation of petitioner's trial attorney, Mr. Light. On his motion to set aside the verdict, Mr. Light alleged the conversation with Mr. Moran in the presence of Assistant District Attorney Nirenberg.

For these reasons, the State's motion for reconsideration is denied.

So ordered.

Dated: Brooklyn, New York
December 19, 1977

s/ .....
U.S.D.J.